

Decision 03-07-015 July 10, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of New Access Communications, LLC (U-6545-C) for Amended Certificate of Public Convenience and Necessity to Expand Authority to Provide Limited Facilities-Based Competitive Local Exchange Services in the State of California.

Application 03-03-006
(Filed March 5, 2003)

O P I N I O N

I. Summary

New Access Communications, LLC (Applicant) seeks a certificate of public convenience and necessity (CPCN) under Pub. Util. Code § 1001 for authority to provide limited facilities-based local exchange telecommunications services as a competitive local carrier (CLC).¹ Applicant was previously granted authority to resell local exchange and interexchange services, and provides service to approximately 45 customers in California. By this decision, we grant the requested authority subject to the terms and conditions set forth below.

¹ A CLC is a common carrier that is issued a CPCN to provide local exchange telecommunications service for a geographic area specified by such carrier.

II. Background

In prior decisions, we authorized the provision of competitive local exchange service within the service territories of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), Roseville Telephone Company (RTC) and Citizens Telecommunications Company of California, Inc. (CTC).

Applicant, a Minnesota limited liability company, requests authority to operate as a limited facilities-based provider of local exchange services within Pacific and Verizon's service territories.

By Decision (D.) 01-06-014 and D.01-10-010, Applicant was granted a CPCN to resell interexchange and local exchange services, respectively.

Applicant's principal place of business is located at 801 Nicollet Mall, Suite 350, Minneapolis, Minnesota 55402.

III. Financial Qualifications

To be granted a CPCN for authority to provide facilities-based local exchange service, an applicant must demonstrate that it has \$100,000 cash or cash equivalent to meet the firm's start-up expenses. The applicant must also demonstrate that it has sufficient additional resources to cover all deposits required by other telecommunications carriers in order to provide service in California.² Applicant provided an audited financial statement that demonstrates that it meets the financial requirements.

² The financial standards for certification to operate as a CLC are set forth in D.95-12-056, Appendix C, Rule 4.B.

IV. Technical Qualifications

To be granted a CPCN for authority to provide local exchange service, an applicant must make a reasonable showing of technical expertise in telecommunications or a related business. Applicant supplied biographical information on its management that demonstrates that it has sufficient expertise and training to operate as a telecommunications provider.

Applicant represents that no one associated with or employed by Applicant as an affiliate, officer, director, partner, or owner of more than 10% of Applicant was previously associated with a telecommunications carrier that filed for bankruptcy or went out of business, or was sanctioned by the Federal Communications Commission (FCC) or any state regulatory agency for failure to comply with any regulatory statute, rule, or order, except as follows.

On July 3, 2002, November 1, 2002, and November 26, 2002, the FCC issued orders finding that Applicant had slammed a total of three customers. Applicant's third party verifier had not obtained separate verification for all services affected by the change. Pursuant to the orders, Applicant has issued refunds to the affected customers. Applicant represents that all of its verifications now meet FCC standards.

On May 16, 2002, the Minnesota Office of the Attorney General (OAG) served Applicant with a Civil Investigative Demand (CID). The CID stated that OAG believed Applicant had committed false advertising, deceptive trade practices, and consumer fraud in connection with local and long distance service. The CID also alleged that Applicant had billed customers for services after they had switched to another carrier. The CID requested information on Applicant's business practices. Applicant has supplied the requested information, and is in settlement discussions with the OAG. Applicant represents that its marketing

and disclosure of fees and charges conformed to all applicable regulations. It also represents that any billing issues are due to its underlying carrier and, therefore, beyond its control.

On August 3, 2001, the Washington Utilities and Transportation Commission (WUTC) notified Applicant that its staff had completed an investigation regarding slamming, responses to informal complaints, record keeping, discontinuance of service, and price lists. The WUTC staff recommended a penalty of \$212,600. Applicant subsequently settled the matter. It admitted liability for negligence and negligent supervision of third party marketers and verifiers, and 19 instances of slamming. Applicant paid a fine and costs totaling \$72,806. Applicant represents that there have been no complaints in Washington since Applicant resumed marketing.

On June 15, 2001, the Oregon Department of Justice issued a Notice of Assurance and Voluntary Compliance alleging that Applicant had slammed customers. Applicant entered into a settlement agreement calling for a voluntary contribution of \$35,000 to the Oregon Consumer Education Revolving Account, and agreeing to prospective remedies to its conduct. Applicant did not admit any wrongdoing or liability. Applicant represents that it has not received any complaints in Oregon since it resumed marketing in Oregon.

On January 7, 2002, the Indiana Office of Utility Consumer Counselor filed a complaint with the Indiana Utility Regulatory Commission alleging Applicant had slammed customers. Applicant entered into a settlement that calls for a payment of \$20,000 to the Indiana Utility Ratepayer Trust Fund, and credits of approximately \$87,000 to certain customers. The settlement also contains forward-looking conduct remedies. Applicant did not admit any wrongdoing or liability.

On April 18, 2002, the Iowa Office of Consumer Advocate filed a request for a formal proceeding with the Iowa Utilities Board (IUB). The request alleged that Applicant had slammed a single customer. On April 21, 2003, the IUB approved a settlement that calls for a \$500 penalty. Applicant did not admit any liability.

On January 21, 2003, the Alabama Public Service Commission issued an order against Applicant to show cause why its certificate of authority should not be revoked for failure to pay certain fees. Applicant represents that since it did not have any Alabama operations or customers, it was not aware that fees were owed. Applicant submitted the necessary report, and paid a \$100 fine. It was then dismissed from the proceeding.

Applicant represents that it has not received complaints from any of its approximately 45 California customers.

Applicant represents that the above complaints regarding marketing are for late 2000 through 2001. The majority of the complaints related to a single outside telemarketer. Applicant discontinued relations with the telemarketer in early 2002. Applicant also says that many of the problems resulted from incomplete or erroneous information from the underlying carrier.

Applicant says that it has taken the following actions to prevent recurrences of the complaints:

- Terminated relations with the marketer responsible for the majority of the telemarketing related complaints.
- Modified sales and verification scripts to comply with all applicable regulations.
- Instituted a practice of mailing new customers an information packet after the sale has been verified. The packet confirms the customers decision to switch to Applicant, and contains

terms and conditions of service, pricing information, and contact information for Applicant.

- Retained a third party firm to randomly monitor Applicants telemarketing contractors.
- Instituted tighter information and reporting systems to track marketing complaints, and deal with problem marketers.
- Instituted regular loss date audits to ensure that it ceases billing customers who have discontinued service, and issues credits to customers who have been mistakenly billed.

Since Applicant appears to have taken steps to avoid repetition of the above types of violations, and we have received no complaints from its California customers, we will not deny it the requested expansion of its existing authority. However, we remind Applicant that we expect its full compliance with all applicable state and federal requirements regarding the provision of telecommunications services. In addition, Applicant is responsible for the provision of service to its customers. Any problems it encounters with its underlying carrier are Applicant's responsibility, not the responsibility of its customers.

V. Tariffs

Commission staff reviewed Applicant's draft tariffs and found them to be in compliance with Commission rules and regulations.

VI. California Environmental Quality Act (CEQA)

The CEQA requires the Commission as the designated lead agency to assess the potential environmental impact of a project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible. Since Applicant will not be constructing any facilities for the purpose of providing local exchange services,

except for equipment to be installed in existing buildings or structures, it can be seen with certainty that there is no possibility that granting this application will have an adverse impact upon the environment. Applicant must file for additional authority, and submit to any necessary CEQA review, before it can construct facilities except for equipment to be installed in existing buildings or structure.

VII. Categorization and Need for Hearings

In Resolution ALJ 176-3109 dated March 13, 2003, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

VIII. Comments on Draft Decision

This is an uncontested matter in which the decision grants the requested relief. Therefore, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

IX. Conclusion

We conclude that the application conforms to our rules for certification as a CLC. Accordingly, we shall grant Applicant a CPCN to provide limited facilities-based local exchange service in Pacific and Verizon's service territories subject to compliance with the terms and conditions set forth herein.

X. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Jeffrey P. O'Donnell is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. A notice of the filing of the application appeared in the Daily Calendar on March 11, 2003.
2. There were no protests to this application.
3. A hearing is not required.
4. In prior decisions, the Commission authorized competition in providing local exchange telecommunications services within the service territories of Pacific, Verizon, RTC and CTC.
5. By D.01-10-010, Applicant was granted a CPCN to resell local exchange services.
6. Applicant has a minimum of \$100,000 of cash or cash equivalent that is reasonably liquid and readily available to meet its start-up expenses.
7. Applicant has sufficient additional cash or cash equivalent to cover any deposits that may be required by other telecommunications carriers in order to provide the proposed service.
8. Applicant's management possesses sufficient experience and knowledge to provide local exchange services to the public.
9. As part of its application, Applicant submitted a draft of its initial tariffs that were in compliance with Commission rules and regulations.
10. Applicant will not construct any facilities, except for equipment to be installed in existing buildings or structures, in order to provide the proposed service.

Conclusions of Law

1. Applicant has the financial ability to provide the proposed service.
2. Applicant has made a reasonable showing of technical expertise in, or related to, telecommunications.
3. Public convenience and necessity require the competitive local exchange services to be offered by Applicant, subject to the terms and conditions set forth herein.
4. The application should be granted to the extent set forth below.
5. Applicant, once granted a CPCN, should be subject to the applicable Commission rules, decisions, General Orders and statutes that pertain to California public utilities.
6. Since Applicant will not construct any facilities, except for equipment to be installed in existing buildings or structures, it can be seen with certainty that granting it authority to provide local exchange services will not have a significant adverse effect upon the environment.
7. Because of the public interest in competitive local exchange services, the following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity (CPCN) is granted to New Access Communications, LLC (Applicant) to provide limited facilities-based local exchange services in the service territories of Pacific Bell Telephone Company and Verizon California Inc., subject to the terms and conditions set forth below.

2. Applicant is authorized to file tariff schedules for the provision of competitive local exchange services. Applicant may not offer competitive local exchange services until tariffs are on file. Applicant's initial filing shall be made in accordance with General Order (GO) 96-A, excluding Sections IV, V, and VI. The tariff shall be effective not less than one day after approval by the Commission's Telecommunications Division. Applicant shall comply with its tariffs.

3. The certificate granted and the authority to render service under the rates, charges, and rules authorized herein will expire if not exercised within 12 months after the effective date of this order.

4. The corporate identification number assigned to Applicant, U-6545-C, shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

5. Applicant shall comply with all applicable rules adopted in the Local Exchange Competition proceeding (Rulemaking 95-04-043/Investigation 95-04-044), as well as all other applicable Commission rules, decisions, GOs and statutes that pertain to California public utilities, subject to the exemptions granted in this decision.

6. Applicant shall comply with the requirements applicable to competitive local exchange carriers included in Attachment A to this decision.

7. Applicant is not authorized to construct facilities, except for equipment to be installed in existing buildings or structures.

8. This proceeding is closed.

This order is effective today.

Dated July 10, 2003, at San Francisco, California.

MICHAEL R. PEEVEY

President

CARL W. WOOD

LORETTA M. LYNCH

GEOFFREY F. BROWN

SUSAN P. KENNEDY

Commissioners

ATTACHMENT A

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**REQUIREMENTS APPLICABLE TO COMPETITIVE
LOCAL EXCHANGE CARRIERS**

1. Applicant shall file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.
2. Applicant is subject to the following fee and surcharges that must be regularly remitted per the instructions in Appendix E to D.00-10-028. The Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is zero.
 - a. The current 0.0% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service Trust Administrative Committee Fund (Pub. Util. Code § 879; Resolution T-16688, December 5, 2002). The surcharge changes to 1.20% effective September 1, 2003 (Resolution T-16689, April 17, 2003);
 - b. The current 0.300% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (Pub. Util. Code § 2881; D.98-12-073 and Resolution T-16663, August 22, 2002);
 - c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.11% of gross intrastate revenue (Resolution M-4807);
 - d. The current surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; set by Resolution T-16702 at 0.21%, April 17, 2003);
 - e. The current 2.70% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-B (D.96-10-066, p. 191, App. B, Rule 6.F., (Resolution 16690, April 17, 2003); and
 - f. The current 0.0% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by

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D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G, Resolution T-16686, December 5, 2002).

3. Applicant is a competitive local exchange carrier (CLC). The effectiveness of its future tariffs is subject to the schedules set forth in Appendix C, Section 4.E of Decision (D.) 95-12-056:

“E. CLCs shall be subject to the following tariff and contract filing, revision and service pricing standards:

- “(1) Uniform rate reductions for existing tariff services shall become effective on five (5) working days’ notice. Customer notification is not required for rate decreases.
- “(2) Uniform major rate increases for existing tariff services shall become effective on thirty (30) days’ notice to the Commission, and shall require bill inserts, or first class mail notice to customers at least 30 days in advance of the pending rate increase.
- “(3) Uniform minor rate increases, as defined in D.90-11-029, shall become effective on not less than (5) working days’ notice to the Commission. Customer notification is not required for such minor rate increases.
- “(4) Advice letter filings for new services and for all other types of tariff revisions, except changes in text not affecting rates or relocations of text in the tariff schedules, shall become effective on forty (40) days’ notice.
- “(5) Advice letter filings revising the text or location of text material which do not result in an increase in any rate or charge shall become effective on not less than five (5) days’ notice to the Commission.”
- “(6) Contracts shall be subject to GO 96-A rules for NDIECS, except interconnection contracts.

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“(7) CLCs shall file tariffs in accordance with PU Code § 876.”

4. Applicant may deviate from the following provisions of GO 96-A:
(a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers; and (b) paragraph II.C.(4), which requires that “a separate sheet or series of sheets should be used for each rule.” Tariff filings incorporating these deviations shall be subject to the approval of the Commission’s Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as reflected in 2 above.
5. Applicant shall file a service area map as part of its initial tariff.
6. Prior to initiating service, Applicant shall provide the Commission’s Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This information shall be updated if the name or telephone number changes, or at least annually.
7. Applicant shall notify the Director of the Telecommunications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.
8. Applicant shall keep its books and records in accordance with the Generally Accepted Accounting Principles.
9. In the event Applicant’s books and records are required for inspection by the Commission or its staff, it shall either produce such records at the Commission’s offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.
10. Applicant shall file an annual report with the Director of the Telecommunications Division, in compliance with GO 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.
11. Applicant shall file an affiliate transaction report with the Director of the Telecommunications Division, in compliance with D.93-02-019, on a calendar year basis using the form contained in Attachment D.
12. Applicant shall ensure that its employees comply with the provisions of Public Utilities (Pub. Util.) Code § 2889.5 regarding solicitation of customers.

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13. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Telecommunications Division in writing of its compliance.
14. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fee listed in 2 above, the Telecommunications Division shall prepare for Commission consideration a resolution that revokes Applicant's CPCN unless it has received written permission from the Telecommunications Division to file or remit late.
15. Applicant is exempt from General Order 96-A, subsections III.G(1) and (2), and Commission Rule of Practice and Procedure 18(b).
16. Applicant is exempt from Pub. Util. Code §§ 816-830.
17. Applicant is exempt from the requirements of Pub. Util. Code § 851 for the transfer or encumbrance of property whenever such transfer or encumbrance serves to secure debt.
18. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Telecommunications Division's Bankruptcy Coordinator.
19. Applicant shall send a copy of this decision to concerned local permitting agencies not later than 30 days from the date of this order.

(END OF ATTACHMENT A)

ATTACHMENT B
ANNUAL REPORT

An original and two copies shall be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3251, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar year for which the annual report is submitted.

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Public Utilities Code.

Required information:

1. Exact legal name and U # of the reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (e.g., corporation, partnership, sole proprietorship, etc.).
If incorporated, specify:
 - a. Date of filing articles of incorporation with the Secretary of State.
 - b. State in which incorporated.
6. Number and date of the Commission decision granting the CPCN.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. List of all affiliated companies and their relationship to the utility. State if affiliate is a:
 - a. Regulated public utility.
 - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.

For answers to any questions concerning this report, call (415) 703-1961.

(END OF ATTACHMENT B)

ATTACHMENT C

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CALENDAR YEAR AFFILIATE TRANSACTION REPORT

1. Each utility shall list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the annual Affiliate Transaction report.

- Form of organization (e.g., corporation, partnership, joint venture, strategic alliance, etc.);
- Brief description of business activities engaged in;
- Relationship to the utility (e.g., controlling corporation, subsidiary, regulated subsidiary, affiliate);
- Ownership of the utility (including type and percent ownership)'
- Voting rights held by the utility and percent;
- Corporate officers.

2. The utility shall prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart should have the controlling corporation (if any) at the top of the chart; the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart and all secondary subsidiaries and affiliates (e.g. a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels. Any regulated subsidiary should be clearly noted.

3. For a utility that has individuals who are classified as "controlling corporations" of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either a) is a public utility or b) transacts any business with the utility filing the annual report excluding the provision of tariffed services.

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4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility's annual Affiliate Transaction Report and verified in accordance with Section I-F of Decision 93-02-019.

6. Utilities that do not have affiliated entities must file, in lieu of the annual transaction report, an annual statement to the commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

(END OF ATTACHMENT C)